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No. 10-229

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SUSAN M. FOX,

Petitioner

v.

TRAVERSE CITY AREA PUBLIC SCHOOLS BOARD OF EDUCATION, TRAVERSE CITY AREA PUBLIC SCHOOLS, CHRISTINE M. DAVIS and ROBERT T. PETERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE SIXTH CIRCUIT CORRECTLY FIND THAT PLAINTIFF'S COMPLAINTS ABOUT HER CASE LOAD OF SPECIAL EDUCATION STUDENTS DURING A FOUR WEEK PERIOD IN WHICH SHE WAS TEACHING A REMEDIAL READING CLASS MADE SOLELY TO HER DIRECT SUPERVISORS DURING REGULAR SCHOOL HOURS AND ON SCHOOL PREMISES WERE MADE AS AN EMPLOYEE NOT AS A PRIVATE CITIZEN AND THEREFORE HER SPEECH WAS NOT PROTECTED PURSUANT TO THE HOLDING OF THIS COURT IN *GARCETTI v CEBALLOS*, 547 US 410 (2006)?

II. DID THE SIXTH CIRCUIT CORRECTLY FIND THAT PLAINTIFF FAILED TO MEET HER BURDEN OF SUBMITTING EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT THAT SHE WAS SPEAKING AS A PRIVATE CITIZEN AS OPPOSED TO AS AN EMPLOYEE?

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COUNTER-STATEMENT OF THE CASE

This action arises out of the non-renewal of plaintiff/petitioner's contract as a probationary special education teacher. She began working for Traverse City Public Schools ("TCAPS") at Blair Elementary School beginning with the 2005-2006 school year. By March of 2006 the school principal, respondent/defendant Robert Peters, began documenting problems with her performance.

Despite performance issues, TCAPS chose to offer plaintiff a second probationary contract for the 2006-2007 school year. TCAPS wanted to avoid having to search for a replacement so soon after hiring her and hoped she would improve.

Plaintiff's performance did not improve significantly and on February 27, 2007, she was notified of the decision to not renew her contract. She claims the non-renewal was retaliation in response to complaints that she was assigned to teach too many special education students in violation of state and federal law.[1]

Plaintiff admitted in her deposition that the claim of excessive caseload is based solely on a four week period in which she instructed a section of a remedial

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1. Mr. Peters and Christine Davis, TCAPS Executive Director of Human Resources and Labor Relations, both testified that plaintiff never complained to them that the school was violating any laws. Nor did they receive any reports from anyone else that plaintiff had made such allegations prior to the decision to not renew her contract. (*See*, Affidavits, Exhibits D and G to Def. Br. Docket Nos. 69-8 and 69-11).

reading program known as Read 180. The program was first implemented at Blair Elementary at the beginning of the 2006-2007 school year. Plaintiff taught a Read 180 class from the end of August until September 25, 2006, when she was removed due to poor performance.

Plaintiff's performance did not improve after removal from the READ 180 program. She was advised that her performance was deficient on several occasions during the five months between removal from the READ 180 program and notification of the non-renewal.

Plaintiff's complaint alleged six counts: (1) Violation of Civil Rights (Free Speech and Association); (2) Violation of Michigan Public Policy; (3) Retaliation; (4) Improper Interference with Employment Contract; (5) Civil Conspiracy, and; (6) Violation of the Michigan Whistleblowers Protection Act, ("WPA"). The district court dismissed counts 4 and 5 with prejudice on December 10, 2008, in an order granting in part and denying in part Plaintiff's Second Motion for Leave to Amend the Complaint.

Defendants filed a motion for summary judgment regarding all remaining claims. The district court held that the WPA claim was barred by the applicable 90 day statute of limitations and provided the exclusive remedy thereby precluding a separate claim alleging violation of Michigan Public Policy arising out of the same occurrence.[2]

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2. Plaintiff did not appeal the dismissal of Counts 2, 4, 5 or 6. Her appeal was limited to the dismissal of her First Amendment and retaliation claims which were set forth in Counts 1 and 3.

In regard to the free speech claims, District Court Judge, Robert Jonker, found as a matter of law that plaintiff was not speaking as a private citizen when she complained to her supervisors about the number of special education students she was assigned to teach. He based his decision on the Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and the Sixth Circuit cases of *Weisbarth v. Geauga Park Dist*, 499 F.3d 538 (6th Cir. 2007) and *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007). The Sixth Circuit affirmed the grant of summary judgment.

Plaintiff has now petitioned this Court for a Writ of Certiorari. This request should be denied. The district court and Sixth Circuit correctly applied this Court's holding in *Garcetti* to the facts of this case. Her alleged complaints arose directly out of her duties as a special education teacher. She complained of being assigned an excessive workload. She testified to working extensive overtime and complained that it was physically impossible to meet the demands of her job. She attempted to justify poor performance based on complaints of excessive work load. She testified that the caseload violated her contract and it was her job to advocate for the students.

Plaintiff specifically testified that she was fired for doing her job and holding the school district to the terms of her contract. She agreed that as a special education teacher it was part of her duties to participate in preparation, implementation and monitoring of the Individual Education Plans ("IEPs") prepared for special education students. The IEPs set forth the minutes of instruction to be provided to the students,

the areas of instruction and describe how the students' specific needs will be met. Plaintiff also served as a member of school improvement and special education committees. Her duties in these roles included providing comment on the level of service to students and methods of improving instruction.

This is not an appropriate case for this Court to address the split within the Federal Circuits regarding whether the question as to the role in which a government employee speaks (i.e. employee or private citizen) should be reviewed as a matter of law or as a mixed question of law and fact. As the Sixth Circuit held, the material facts in this case are undisputed and plaintiff's comments were made as an employee. Moreover, it was plaintiff's burden to submit evidence showing she spoke as a private citizen rather than as an employee. Her failure to do so cannot create an issue of material fact. Thus, regardless of the standard of review the correct decision was reached.

Finally, plaintiff's suggestion that different standards should apply to government employees based on whether they exercise discretion or perform ministerial tasks would subvert the holding of *Garcetti* and unnecessarily hinder the ability of local governments to manage their affairs. Such a standard would transform "run of the mill" work place grievances into constitutional claims. Moreover, plaintiff did not perform merely ministerial tasks. She was responsible for exercising judgment as to the instruction of the students on her caseload. She specifically testified to disagreements with the administration regarding curriculum and use of her preferred teaching methods.

She also volunteered and persuaded Mr. Peters to assign her to instruct the reading program which resulted in her complaints of being over-assigned.

COUNTER-STATEMENT OF FACTS

A. Problems with Plaintiff's Performance in 2006.

Plaintiff's performance proved to be deficient in numerous areas. After approximately six months, Mr. Peters began documenting performance issues. Her performance deteriorated over time. Concerns during her first year of employment included: (1) failure to submit Individual Education Plans in a timely manner; (2) improperly instructing a special education assistant to complete paperwork; (3) complaints from parents that plaintiff improperly recommended medications; (4) lack of efficiency in completing tasks; (5) failure to communicate with a parent; (6) submission of an IEP without the required signatures, and; (6) failure to establish student goals. (*See*, Exhibit C, File maintained by R. Peters documenting performance issues and Exhibit D, Affidavit of R. Peters attached to Def. Br. Docket Nos. 69-7, 69-8 and 69-11)

B. Read 180 Program.

During the summer of 2006, Mr. Peters decided to implement the Read 180 program. Read 180 was developed to assist students encountering difficulty with traditional methods of learning to read.

Plaintiff learned of the proposed implementation and asked for assignment to the program. Mr. Peters

reluctantly acquiesced in response to plaintiff's insistent and repeated requests. Plaintiff taught the course for approximately four weeks. Mr. Peters removed her due to poor performance on or about September 25, 2006. (Exhibit D and Exhibit H attached to Def. Br. Docket Nos. 69-8 and 69-12)

There were 15 special education students in the READ 180 class. The class was 90 minutes in length. Two of the 15 students were part of plaintiff's special education caseload. The remaining 19 students on her case load were receiving instruction in math from special education teacher, Robert Saunders, during the 90 minute class period. Both plaintiff and Mr. Saunders received credit toward meeting special education minutes for the students on their case loads participating in the READ 180 program and the math class. (Exhibit I, R. Peters Dep.(12/10/08) at pp. 131-132 attached to Def Br. Docket No. 69-13)

The special education regulations provide for what is known as departmentalization in a school employing more than one special education teacher. Under departmentalization a special education teacher is allowed to instruct up to the combined number of students on the participating teachers caseloads during a single class period. (As many as 42 based on two teachers with 21 student caseloads) The teachers cannot provide instruction in more than one subject per period and cannot serve more than 12 students on average per day. (See, Exhibit J, CFR. 340.1749 a-c, attached to Def, Br. Docket No. 69-15).

Mr. Peters testified that special education at Blair Elementary was departmentalized during the READ

180 program. (Exhibit I, R. Peters Dep. (10/1/08) at pp. 12-13, Docket No. 69-13) Thus, Ms. Fox could teach 15 students in the READ 180 program while Mr. Saunders taught math to the other students. (Exhibit D and Exhibit H attached to Def. Br., Docket Nos. 69-8 and 69-12).

C. Problems With Plaintiff's Performance After Read 180.

Following her removal from the Read 180 program plaintiff was still unable to handle her duties. She testified to being required to work until 9:00 or 10:00 p.m. on a regular basis. She was unable to complete her IEP reporting duties in a timely manner. She was again instructed not to use teacher's assistants to complete paperwork.

Plaintiff was unable or unwilling to meet deadlines regarding student documentation. In addition to regularly submitting late and/or incomplete IEP reports, plaintiff failed to comply with deadlines for submission of Medicaid forms (Exhibit N attached to Def. Br. Docket No. 69-18).

D. Plaintiff's Testimony.

Plaintiff agreed that with the exception of the four weeks when she taught a section of Read 180, she was assigned a case load of no more than 21 special education students. She agreed that a caseload of up to 21 students was allowed under the applicable laws and regulations. Thus, her purported complaints of excessive caseload involve only a four week time frame. (Exhibit B, pp. 26-33, and 68-71, attached to Def. Br. Docket No. 69-6)

Plaintiff acknowledged that Mr. Peters complained about her failure to perform her work in a timely manner. She was late with completion of Medicaid forms. Scheduling of IEP's did not occur on a timely basis and she admitted being late for meetings. *Id.* at pp. 84-85, 118. She told Mr. Peters she was having difficulty getting her work done from October 2006 through February of 2007. (*Id.* at 114 -115) She reported these same difficulties to her union representative, Mr. John Scrudato. (Exhibit R attached to Def. Br. Docket No. 69-22)

Plaintiff admits there were discussions about the fact she did not use the approved curriculum. (Exhibit B, pp. 118-124 attached to Def. Br. Docket No. 69-6) She testified to disagreeing with the TCAPS curriculum as follows:

> Q. Let me ask you this: Does the TCAPS curriculum cover the five components of reading instruction?
>
> A. Not in the way that these students needed it.
>
> Q. Says who?
>
> A. Says myself and my experience. (*Id.* at p. 130).

Plaintiff agreed she was notified of deficiencies in her performance prior to February 27, 2007. She admitted having her special education assistant complete paperwork. Plaintiff recalled there being an

issue with a parent of one of her students related to communication, spelling program, tap sheet, instructional minutes, student progress and medication. *Id.* at pp. 134-147.

Plaintiff sent an e-mail to her union representative, John Scrudato complaining about the demands of her job. She complained about having a lot of high minute students but did not claim her caseload violated the law. She admitted deficiencies in her performance. The e-mail is dated February 25 or two days before the meeting where she resigned. (*Id.* at pp. 165-166 and Exhibit R, attached to Def. Br. Docket Nos. 69-6 and 69-22)

Despite the claim of oppressive work demands, she volunteered to serve on "so many committees," including School Improvement, Behavior Committee, SPED Committee. She also shared responsibility with Bob Saunders regarding TASC meetings. She testified to feeling overworked and overloaded. (Exhibit B, pp. 166-169, Docket No. 69-6)

Plaintiff agreed concerns were raised regarding her performance on several occasions after removal from the Read 180 program. She recalls a meeting in November where she was warned that if she did not meet her goals tenure would be denied. She admitted to making mistakes. *Id.* at 174-189.

Plaintiff testified to taking medication for ADHD for 25 to 30 years. She started taking anti-depressants in the summer of 2006 after her first year with TCAPS. She was exhausted due to her first year at TCAPS and having to deal with a divorce. *Id.* at pp. 155-156.

E. Plaintiff's Testimony Regarding the Alleged Statements.

Plaintiff claims to have told her immediate supervisors during September of 2006 that her assignment to teach the Read 180 class along with her regular special education caseload violated state and federal law. She does not claim to have made any other complaints about caseload until the February 27, 2007 meeting. Her comments at that time were made in rebuttal to the list of deficiencies cited as the reasons for the non-renewal.

Plaintiff testified **it was her job to report the alleged violation of law and to protect the children.** She testified that defendants Bob Peters and Chris Davis along with her union representatives tricked her into resigning on February 27th. When asked why defendants would do that, plaintiff responded:

> A. Because I held them to the law. I held them to the law, I protected the children, **I did my job, and I wouldn't stop it, and I held them to my contract**, I told all the people that were in that room except for Don Hakala, I told them all. (Exhibit C, S. Fox Dep. at p. 142, attached to Def. Reply Br. Docket No. 82-5)

There is no dispute that all of the alleged protected speech was made within the employment context. Her complaints about caseload and alleged violations of law were made to her direct supervisors while plaintiff was at school, during normal school hours and were all directly related to her day to day duties as a special education teacher.

It is apparent from her complaints and testimony that the primary focus of her concerns was her claimed inability to instruct 34 special education students in one day. She testified that this inability was due both to legal and physical constraints. She stated it was physically impossible for her to provide the instructional minutes required by her students because of the requirement that she spend 90 minutes per day instructing the Read 180 program. (*See* Exhibit R attached to Def. Br. Docket No. 69-22)

There is no dispute that as a special education teacher she was part of the team responsible for developing, implementing and monitoring IEPs. (See, Pls Br. at pp. 1-3, and 7-13, Docket No. 75) She was required to provide instruction to the special education students according to the terms of their IEPs. The IEPs required that a certain number of minutes of instruction be provided to the individual students in specific areas. *Id.* Her primary complaint regarding the alleged excessive caseload was that she could not provide the level of instruction required by the students pursuant to the IEPs.

Plaintiff also served on the school improvement and special education committees which were established to provide input from teachers regarding student support, budget and programs. As a member of these committees it was part of her duties to provide comment on the level of service provided to the students and methods of improving education. (*See* March 23, 2006 evaluator's summary attached to Pl. Br. as Exhibit A, Docket No. 74-5 to Plaintiff's brief)

REASONS FOR DENYING THE PETITION

I. THERE IS NO BASIS FOR REVERSING THE SIXTH CIRCUIT

The Sixth Circuit correctly held that plaintiff's alleged statements were made pursuant to her duties as a special education teacher and therefore not protected. The decision in this case is consistent with the holding of *Garcetti* and its application by the federal circuit courts of appeal. The federal circuits have consistently held that statements made to facilitate job duties within the chain of command are made as an employee and not a private citizen. This application of *Garcetti* is appropriate and necessary to prevent the transformation of "run of the mill" employee grievances into constitutional claims.

The federal circuits have uniformly found under similar facts that the plaintiff was speaking as an employee and not a citizen. As the Sixth Circuit stated in this case, "Of more immediate pertinence to Fox's claim is the Fifth Circuit's observation that "[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job." *Quoting, Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). The Fifth Circuit in *Davis* collected decisions from the other circuits involving similar claims. *See, Spielga v. Hull*, 481 F.3d 961 (7th Cir. 2007) (Report by correction officer to supervisor regarding possible security lapse made as employee); *Battle v. Bd. of Regents*, 468 F.3d 755 (11th Cir. 2006) (Internal report

of alleged improprieties in handling of federal funds pursuant to duties as financial aid counselor made as employee); *Foraker v. Caffinch*, 501 F.3d 231 (3d Cir. 2007) (Firearms instructors with state police acting as employees when reporting health concerns to supervisor regarding operation of firing range).[3]

A recent example of the consistent and appropriate application of *Garcetti* to complaints made to supervisors in furtherance of plaintiff's duties is found in *Weintraub v. Board of Education*, 593 F.3d 196 (2nd Cir. 2010). The Second Circuit held that a teacher's speech complaining about the failure to suspend students who had committed assault was not protected. The Court held that the speech need not be required by the employee's duties or in response to a request from the employer to have been made as an employee. So long as the speech facilitates performance of plaintiff's job it is not protected. *Id.*

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3. Additional cases from other federal circuits include: *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007) (Social workers' complaints about excessive caseload allegedly placing children in danger made as employees not private citizens); *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008) (Complaints made by registered nurse to supervisor regarding assignment to care for too many patients, difficulty working with doctors and operation of Emergency Room made as employee not private citizen); *Nixon v City of Houston*, 511 F.3d 494 (5th Cir. 2007) (Statements made by police officer to media critical of policy regarding pursuit of fleeing vehicles made as employee and not private citizen where made in furtherance of duties); *Phillips v. City of Dawsonville*, 499 F.3d 1239 (11th Cir. 2007) (Complaints by City Clerk regarding Mayor's alleged misuse of funds for personal purposes made to City Attorney and City Council members made as employee and not private citizen)

As the Second Circuit noted this test is supported by this Court's opinion in *Garcetti* which held that the determination of whether the employee spoke pursuant to his duties is a practical one. It is also consistent with the conclusion that government could not function effectively if every employee grievance became a constitutional matter.

In *Boyce, supra*, the Eleventh Circuit addressed facts analogous to those in the present case. Plaintiffs were managers employed by the DeKalb County Department of Family and Children Services. They complained of excessive caseloads and mismanagement which they warned could endanger children exposed to abuse. The complaints were made to supervisors. The Eleventh Circuit held that the speech was made pursuant to their duties despite the lack of responsibility or control over the size of their caseload. The complaints were made in an effort to facilitate their duties. As the Court stated:

> Significantly, Boyce and Robinson were complaining to their superiors as employees about their workloads for a work reason: they wanted to have their caseloads reduced or to receive help with their work. The purpose of their grievances clearly was not to raise public awareness about children within the care of DeKalb DFCS. If that had been their intention, then they would have identified the children who were in danger. . . . The record shows that this was an internal employee matter and that Boyce's termination and Robinson's transfer were internal decisions by

> their supervisors to accomplish the work of DeKalb DFCS.
>
> * * *
>
> Based upon review of the entire record, Boyce and Robinson "primarily spoke" as employees to improve their work environment; they represented that they were overworked and overwhelmed. As in *Garcetti* the "controlling factor" was that their expressions were made pursuant to official duties . . . and the main thrust of their speech took the form of a private employee grievance.
>
> * * *
>
> Because Boyce and Robinson spoke as government employees about their jobs and not as citizens, they have no First Amendment cause of action based on their employer's reaction to the speech and there is no need to engage in the Pickering balancing analysis. *Id.* at 1346.

The federal district courts have also consistently applied *Garcetti* to find that speech made under circumstances similar to the present case was not protected. For example, in *Yatzus v. Appoquinimink School District*, 458 F.Supp.2d 235 (D. Del. 2006), plaintiff was a school psychologist who complained that the school district was not complying with legal requirements and testing of special education students and certain district employees were disrespectful to the

students and their parents. *Id.* at 241. Her supervisor allegedly retaliated by issuing reprimands for failing to complete IEP paperwork. *Id.* As the Court stated:

> Plaintiff asserts that she engaged in speech as a citizen addressing matters of public concern and not as a school psychologist. She contends that her correspondence to District administrators concerning problems with the special education program and her assistance to a parents group caused defendants to issue reprimands for the purpose of building a record that would justify terminating her employment.
>
> Defendants contend that plaintiff's complaints that the District was violating federal requirements and discriminating against special needs students is not speech protected by the First Amendment because plaintiff's statements were part of her job responsibilities. Because plaintiff testified at her deposition that it was part of her job "to report what [she] perceived as illegal behavior" and to assist parents with OCR complaints, defendants assert her speech is not protected under the standards announced by the Supreme court in *Garcetti*. *Id.* at 245.

The Court agreed with defendants finding that plaintiff made her comments as part of her job responsibilities as a school psychologist thus precluding liability under the First Amendment. The Court did so based in part on plaintiff's deposition where she

acknowledged her duties included participation in the IEP process and being an advocate for the children. She also testified that it was part of her job as the school psychologist to report illegal behavior. *Id.* at 245-246.

In *Ryan v. Shawnee Mission Unified School Dist*, 437 F.Supp.2d 1233 (D. Kan. 2006), plaintiff was a school physical therapist assigned to work with special education students. Her employment was terminated after several disputes with her supervisor regarding the manner of service to be provided to students on her caseload. Similar to the case at issue, she complained the school was violating state law by requiring her to provide physical therapy to students without first obtaining a doctor's order. She also contacted a state agency regarding her complaints. The court found that her speech alleged to have been made to advocate for better treatment of students was all made pursuant to her duties as a school physical therapist and arose directly out of her role as a government employee. *Id.* at 1246-1251. The court also found that plaintiff's complaints were directed only internally, focused on her individual situation and did not involve issues of public concern. As a result, her First Amendment retaliation claims were dismissed with prejudice. *Id.* at 1251-1253.

As these cases demonstrate, the federal circuit and district courts have consistently applied the holding of *Garcetti* to find that internal speech intended to facilitate employment duties, is not protected. This is a correct application of *Garcetti*. The communications owe their existence to the duties the employee was required to perform and involve traditional employee-employer grievances which as this Court noted in *Garcetti* should not be constitutionalized. As stated in *Garcetti*:

> When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. . . . Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. . . . [G]overnment offices could not function if every employment decision became a constitutional matter. . . . [T]hat while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance. *Garcetti, supra* at 418-419.

Plaintiff's argument that the Sixth Circuit improperly required that the communication be made to an outside entity is misplaced. The Court of Appeals did not impose any such requirement. Rather the identity of the person to whom the communication is directed is one important factor in determining if the speech was made as a private citizen rather than as an employee. When statements are made to the media or other outside agencies by employees without management responsibilities there is compelling evidence that the speech was made as a citizen on issues of public concern as opposed to an employee grievance. The fact the Sixth Circuit noted the importance of such evidence and its presence as a distinguishing feature in several cases does not equate to the imposition of an additional necessary element.

The holding in *Reinhardt v. Albuquerque Public Schools*, 595 F.3d 1126 (10th Cir. 2010) does not support

plaintiff's argument. The only true similarity between *Reinhardt* and the present case is that each involved a school employee providing services to disabled students. Unlike the present case, *Reinhardt* involved: (1) the filing of a formal complaint with an outside agency; (2) the hiring of an attorney to prosecute the formal complaint; (3) advocacy for the rights of a specific student to receive a neuropsychological evaluation; (4) a plaintiff employed as a speech pathologist who was not responsible for development, implementation and monitoring IEPs, and; (5) an alleged systematic denial of services to disabled students over a period of years. *Id.* at 1130 1131.

There is no reason to suspect that the Tenth Circuit would have reached a different result than the Sixth Circuit in the present case. A significant distinction between *Reinhardt* and the present case lies in the fact that plaintiff went beyond the chain of command and reported the alleged violations to an outside agency. Even with such facts, the Tenth Circuit's opinion suggests it was a close decision. As the Court stated:

> In Brammer-Hoelter, we indicated that "speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform. Thus the fact that it was not expressly Ms. Reinhardt's duty to report IDEA violations to NMPED is not dispositive on whether she was acting pursuant to her duties. While we have held that if speech reasonably contributes to or facilitates the employee's performance of the official duty,

> the speech is made pursuant to the employees duties, it would be going too far to hold that every time a public employee discovers alleged wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties, the speech is unprotected. After all, "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.
>
> Ms. Reinhardt was not hired to ensure IDEA compliance at Albuquerque public schools. She was hired to provide speech and language services to special education students. Ms. Reinhardt's consulting an attorney and filing the state complaint went well beyond her official responsibilities. *Id.* at 1136.

There is nothing surprising or inconsistent about the result reached in *Reinhardt*. The holding is consistent with the rule uniformly applied by the other federal circuits that speech made in furtherance of employment duties is not protected. As the Tenth Circuit noted, the actions taken by Reinhardt, who was a speech pathologist, including statements made to an outside agency to which she did not report on a regular basis along with the filing of a formal complaint and hiring or an attorney went well beyond facilitation of her duties.

In the present case there are no alleged statements or actions other than those directly linked to facilitation

of plaintiff's duties as a special education teacher.[4] There is simply no evidence to support a finding that she spoke as a citizen as opposed to as an employee.

II. PLAINTIFF FAILED TO SUBMIT EVIDENCE CREATING A MATERIAL ISSUE OF FACT.

This case does not provide a basis for deciding whether the role in which an employee speaks should be analyzed as a question of law or as a mixed question of fact and law. As the Sixth Circuit held there was no dispute regarding any material fact in this case.

Defendant submitted ample evidence showing that plaintiff's statements were made pursuant to her job duties. She testified that it was her job to advocate on behalf of the students. She testified that the reason her contract was not renewed was because she did her job and held the school district to the terms of her contract. There was no dispute that her duties as a special education teacher included formulating, implementing and monitoring IEPs. To the extent her complaints were related to insufficient minutes of instruction being

4. Nor does the Sixth Circuit case of *See v. City of Elryia*, 502 F.3d 484 (6th Cir. 2007) support plaintiff's claims. The plaintiff in *See* was a police officer who made a report of misconduct to the Federal Bureau of Investigation and provided statements included in a newspaper advertisement. He brought suit against the chief of police and the City. The district court granted summary judgment to the City and that decision was not appealed. An interlocutory appeal was filed regarding the denial of qualified immunity to the individual defendant chief of police based on the argument that the statements made by plaintiff were false and reckless. There was no discussion of *Garcetti* and defendant did not argue that the speech was made pursuant to plaintiff's duties.

provided to her students this was part of her responsibility as a special education teacher. Finally, there was no dispute that plaintiff served on the school improvement and special education committees. Her duties as a committee member were to comment on whether the students' needs were being met and to offer suggestions for improvement. The undisputed record clearly established that plaintiff's duties included comment regarding the level of instruction provided to special education students and her First Amendment claim was barred by application of *Garcetti*.

Plaintiff had the burden of establishing that she spoke as a citizen rather than an employee. *See, Garcetti, supra* at 547 U.S. 421-22. She failed to produce evidence to meet that burden. It is immaterial whether the issue of the role in which she spoke is analyzed as a matter of law or a mixed question of fact and law. The result is the same under either analysis and there is no opportunity for this Court to resolve any dispute between the federal circuits in this regard.

III. THERE IS NO LEGAL OR POLICY BASIS FOR DISTINGUISHING APPLICATION OF *GARCETTI* BASED ON DISCRETIONARY VERSUS MINISTERIAL DUTIES.

Plaintiff argues that this Court should establish a new test for application of *Garcetti* based on whether the employee exercises discretion or performs primarily ministerial duties. There is no legal or logical basis for doing so. Moreover, the undisputed facts demonstrate that plaintiff did exercise discretion in performing her duties and would not benefit from the proposed overhaul of *Garcetti*.

The test established in *Garcetti*, based on the distinction between speech as a citizen and speech as a governmental employee provides the proper demarcation for protected speech. As this Court held a government employee does not give up the right to free speech by accepting government employment. However, allowing employees to cast work place grievances as constitutional claims serves no legitimate interest and imposes a heavy burden on the proper management of local government.

Adopting plaintiff's proposed distinction between employees exercising discretion and those performing ministerial duties would unduly narrow the scope of *Garcetti* while providing no offsetting benefit. There is no legal or logical reason to treat government employees differently in terms of First Amendment protection based on their position within the management hierarchy. *Garcetti* provides the proper balance. Government employers should have the right to control speech made in furtherance of employment duties while employees should be allowed to continue to exercise the right to speak as a private citizen. The standard proposed by plaintiff would serve no purpose other than to provide lower level employees with leverage in pressing work place grievances by threatening federal lawsuits.

Even if there were merit to plaintiff's proposed change in the law, she would not benefit from such a change and this is not a proper case for establishing such a rule. She exercised significant discretion in performing her duties. Again she was directly involved in decision regarding content and implementation of

student IEP's. She had latitude in terms of deciding how to utilize the agreed upon minutes of instruction. She testified that she determined the method of instruction for her students and was in the best position to determine the curriculum which best met their needs.

CONCLUSION

This case involved a straightforward application of *Garcetti* and the district court and Sixth Circuit properly granted defendants' motion for summary judgment. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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